

ROBERT J. KANE, State Bar No. 50856  
rkane@stuartkane.com  
STUART KANE LLP  
620 Newport Center Drive, Suite 200  
Newport Beach, California 92660  
Tel: (949) 791-5100  
Fax: (949) 791-5200

Attorneys for Respondent  
PURPLE COMMUNICATIONS, INC.

**UNITED STATES OF AMERICA**  
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**  
**WASHINGTON, D.C.**

PURPLE COMMUNICATIONS, INC.

and

COMMUNICATIONS WORKERS OF  
AMERICA, AFL-CIO

Cases Nos. 21-CA-095151  
21-RC-091531  
21-RC-091584

**ANSWERING BRIEF OF  
RESPONDENT AND EMPLOYER TO  
CROSS-EXCEPTIONS OF  
CHARGING PARTY**

Charging Party's Cross-Exceptions address issues that were not litigated at the hearing in this matter, not addressed by the Board in its December 11, 2014 Decision and Order Remanding, not subject to the remand, and, therefore, not addressed in any way by the Administrative Law Judge in his Supplemental Decision issued on March 16, 2015 to which these Cross-Exceptions are purportedly filed. Charging Party's Cross-Exceptions also reprise arguments asserted in Cross-Exceptions to the Administrative Law Judge's Initial Decision dated October 24 2013 and considered, and rejected, by the Board in its September 24, 2014 Decision, Order, and Direction of Second Election dated September 24, 2014, which addressed all issues in the case save for "the question whether Purple's electronic communications policy was unlawful." *Purple Communications*, 361 NLRB

No. 43, at page 1. Accordingly, there is no reason to answer these Cross-Exceptions substantively as they are exclusively addressed to issues that are not part of this case.

The Board stated on December 11, 2014 that “Our decision is carefully limited.” *Purple Communications*, 361 NLRB No. 126 at page 1. The Board went on to explain that its Decision dealt only with bans on nonworking time use of email, stating, “that an employer may justify a total ban on nonwork use of email, including Section 7 use on nonworking time, by demonstrating that special circumstances make the ban necessary to maintain production or discipline.” 361 NLRB No. 126 at page 1. The Board went on to state that “we adopt a presumption that employees who have been given access to the employer’s email system in the course of their work are entitled to use the system to engage in statutorily protected discussions about their terms and conditions of employment while on non-working time, absent a showing by the employer of special circumstances that justify specific restrictions.” 361 NLRB No. 126 at page 5. In its footnote 13 the Board stated “We do not reach *Register Guard’s* definition of discrimination, because no party has asked us to reconsider it here, and doing so is not necessary to our decision.” 361 NLRB No. 126 at page 5. The Board went on to explain the limits of its remand stating, “we will remand this issue (the rebuttable presumption) to the judge to allow the Respondent to present evidence of special circumstances justifying the restrictions it imposes on employees’ use of its email system.” 361 NLRB No. 126 at page 17 (parenthetical added for clarity). It also stated, “we will remand this aspect of this case (retroactive application) to the administrative law judge for further proceedings consistent with this decision, including allowing the parties to introduce evidence relevant to a determination of the lawfulness of the Respondent’s electronic communications policy.” 361 NLRB No. 126 at page 17 (parenthetical added for clarity). The Board’s Order specifically stated that “the allegation that the Respondent violated Section 8 (a)(1) by maintaining the Electronic Communication Policy and the election objection based on that policy are remanded to Administrative Law Judge Paul Bogas for further appropriate action as set forth above. 361 NLRB No. 126 at page 17. (emphasis

added).

The Administrative Law Judge's Supplemental Decision is true to the remand order. Judge Bogas recounted Charging Party's request to the Board for special permission to present additional evidence and the Board's denial of that request in light of Respondent's representation that it would not contend that special circumstances, as defined in the Board's Decision, exists and stated that the Administrative Law Judge reasonably determined that no additional evidence on this issue needed to be presented, without prejudice to Charging Party raising on exceptions, if appropriate, the argument that it should have been permitted to develop record evidence on other matters. Supplemental Decision of ALJ at page 5 footnote 9. The Administrative Law Judge stated that the matters that he was invited by Charging Party "to wade into are not only outside the parameters of this remand proceeding, but are explicitly or implicitly excluded from it by the Board's decision." Supplemental Decision of ALJ at page 6. The Administrative Law Judge went on to correctly explain that a Section 8(a)(3) contention has never been a part of this proceeding because the complaint alleges only that the policy violates Section 8(a)(1), that the working time argument Charging Party wanted to make the Board specifically foreclosed by repeatedly stating that the instant case concerned only non-working time, and that the argument regarding special remedies was ruled out by the Board's remand decision which explicitly stated that remedial obligations were limited to rescission of the policy and standard notifications to employees, and that in any event, evidence on that subject could have been and should have been presented at the hearing, but was not. Supplemental Decision of ALJ at page 6.

The same is the case with regard to other issues and Charging Party's attempt to make up for this by culling from the record stray references, for example, the reference in Respondent's Exhibit 8 to a Purple email address for one employee, when all the other email addresses, including for that employee, were personal gmail and other personal email addresses, and that exhibit was introduced on another issue, and there is no

evidence that Purple knew of this at any relevant time as the issue of disparate enforcement was never litigated. Charging Party also does this by unsupported presumptions, for example, that employee's time not actually on calls was free time, as well as making up facts not in the record, for example, that some of Purple's interpreters are hearing impaired.

### **CONCLUSION**

For all of these reasons, Charging Party's Cross Exceptions should be disregarded.

Dated: July 7, 2015

Respectfully submitted,

STUART KANE LLP

By:

A handwritten signature in cursive script, appearing to read "R. Kane", written over a horizontal line.

ROBERT J. KANE  
Attorneys for Respondent  
PURPLE COMMUNICATIONS, INC.

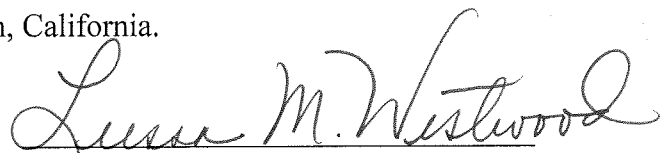
**PROOF OF SERVICE**  
*PURPLE COMMUNICATIONS, INC. v.*  
*COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO*  
Case No. 21-CA-0951151, 21-RC-091531, and 21-RC-091584

I am employed in the County of Orange, State of California. I am over the age of 18 and am not a party to the within action. My business address is 620 Newport Center Drive, Suite 200, Newport Beach, California 92660. On **July 7, 2015**, I served the foregoing document described as follows:

**ANSWERING BRIEF OF RESPONDENT AND EMPLOYER TO CROSS-  
EXCEPTIONS OF CHARGING PARTY**

- ☐ **By United States Mail:** I am readily familiar with the firm's practice for collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day with postage thereon fully prepaid at Newport Beach, California, in the ordinary course of business. I enclosed the above-referenced document(s) in a sealed envelope or package addressed to the person(s) at the address(es) as set forth below, and following ordinary business practices above I placed the package for collection and mailing the date and at the place of business set forth below.
- ☒ **\*\*By Overnight Delivery:** I enclosed the documents in an envelope or package provided by an overnight delivery carrier and addressed to the person(s) at the address(es) listed below. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier.
- ☐ **By Fax Transmission:** I caused to be transmitted the document described herein via the fax number listed below. Upon completion of said facsimile transmission, the transmitting machine issued a transmission report showing the transmission was complete and without error.
- ☐ **By Messenger Service:** I served the above-referenced document(s) by placing them in an envelope or package addressed to the person(s) at the address(es) listed below and provided them to a professional messenger service for personal service.
- ☒ **By Electronic Service:** I caused the document to be sent to the person(s) at the e-mail address(es) listed below. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.
- ☐ **(STATE)** I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
- ☒ **(FEDERAL)** I declare under the laws of the United States of America that I am employed in the office of a member of the Bar of this court at whose direction the service was made and that the foregoing is true and correct.

Executed on July 7, 2015, at Newport Beach, California.

  
Leessa M. Westwood

## SERVICE LIST

**\*\*Honorable Paul Bogas**  
Administrative Law Judge  
Washington, D.C. Office  
1099 14th Street, NW, Room 5400 East  
Washington, DC 20570-0001

David A. Rosenfeld  
WEINBERG, ROGER & ROSENFELD  
A Professional Corporation  
1001 Marina Village Parkway, Suite 200  
Alameda, CA 94501-6430

Lisl Duncan  
WEINBERG, ROGER & ROSENFELD  
A Professional Corporation  
800 Wilshire Boulevard, Suite 1320  
Los Angeles, CA 90017-2623

John Doran  
Communications Workers of America, AFL-CIO  
District 9  
2804 Gateway Oaks Drive, Suite 150  
Sacramento, CA 95833-4349

Mary K. O'Melveny  
Communications Workers of America, AFL-CIO  
501 Third Street N.W.  
Washington, DC 20001-2797

Laura Reynolds  
Communications Workers of America, AFL-CIO  
District 9  
12215 Telegraph Road, Suite 210  
Santa Fe Springs, CA 90670-3344

Judith G. Belsito  
Communications Workers of America, AFL-CIO  
District 9  
12215 Telegraph Road, Suite 210  
Santa Fe Springs, CA 90670-3344

## **\*\*Overnight Delivery & E-mail (Only)**

E-mail: Paul.Bogas@nlrb.gov

*Counsel for the Charging Party*

Telephone: (510) 337-1001  
E-mail: drosefeld@unioncounsel.net

*Counsel for the Charging Party*

Telephone: (213) 380-2344  
E-mail: lduncan@unioncounsel.net

*Representative for Charging Party (Primary)*

Telephone: (916) 921-4500  
E-mail: jweitkamp@cwa-union.org

*Representative for Charging Party  
(Notification)*

Telephone: (202) 434-1234  
E-mail: maryo@cwa-union.org

*Representative for Charging Party*

Telephone: (562) 944-1300  
E-mail: lreynolds@cwa-union.org

*Representative for Charging Party  
(Additional Service)*

Telephone: (562) 944-1300  
E-mail: jrbelsito@cwa-union.org

Kayce R. Compton  
Counsel for the General Counsel  
Division of Advice  
National Labor Relations Board  
1099 14th Street, N.W.  
Washington, DC 20570

Cecelia Valentine, Esq.  
National Labor Relations Board  
Region 21  
888 South Figueroa Street, 9th Floor  
Los Angeles, CA 90017-5449

Olivia Garcia  
Regional Director  
National Labor Relations Board  
Region 21  
888 South Figueroa Street, 9th Floor  
Los Angeles, CA 90017-5449

*Counsel for the General Counsel Division of  
Advice*

Telephone: (202) 273-2491  
E-mail: [kayce.compton@nrlrb.gov](mailto:kayce.compton@nrlrb.gov)

*General Counsel for the NLRB*

Telephone: (213) 894-5200  
E-mail: [cecilia.valentine@nrlrb.gov](mailto:cecilia.valentine@nrlrb.gov)

*Regional Director, Region 21*

Telephone: (213) 894-5200  
E-mail: [olivia.garcia@nrlrb.gov](mailto:olivia.garcia@nrlrb.gov)